

A

**Tan Eng Lok v
The estate of Tan Kim Tiong & Anor**

HIGH COURT (MELAKA) — SUIT NO 22-51 OF 1996
SURIYADI J
14 JULY 1999

B

Civil Procedure — Party — Action against estate of deceased — First defendant referred to as ‘Estet Tan Kim Tiong’ in writ — Failure to prove death of first defendant or extraction of letter of administration — Whether suit misconceived

C

Succession — Will — Bequest of Malacca customary land — Beneficiary was not legitimate daughter of deceased or certificated person — Will validly and duly executed — Whether beneficiary has right to inherit land

D

The plaintiff is the legitimate son and beneficiary of the deceased. The deceased had four pieces of Malacca customary land. The parties agreed on the certain facts, inter alia: (i) the second defendant is not the lawful natural daughter of the deceased; and (ii) the deceased left a will dated 4 October 1974 in which he bequeath the land to the second defendant. The issue before the court was whether the land, which was Malacca customary land, was transmissible to the second defendant — who is not a Malay, a certificated person or the natural child of the deceased — by way of the will.

E

Held:

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(1) Under the Wills Ordinance 1959, every person of sound mind may freely devise, bequeath or dispose off by will all property which he owns, or to do which he is entitled either at law or in equity at the time of his death, notwithstanding that he may become entitled to that property subsequent to the execution of the will. As the parties in the present case had agreed that the will was validly and duly executed by the deceased, it stands to reason that they accepted the competency of the deceased to bequeath his property to anyone he desired. As the property was distributed according to the instructions of the will, the Will Ordinance 1959 therefore takes center stage (see p 200F–G).

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H

(2) The second defendant’s predicament of not being the legitimate daughter of the deceased or certificated person does not deny her the right to inherit the land. As the parties had agreed that the will was duly executed, no fraud being suggested and no legal obstacle present to prevent the deceased bequeathing his property to anybody at his death, the second defendant was therefore entitled to the land (see p 200 H–I).

I

(3) The plaintiff failed to prove that the first defendant has passed away or a letter of administration has been extracted. Since the first defendant was referred to as ‘Estet Tan Kim Tiong’ in the

writ and no amendment had been applied for by the plaintiff to correct the name of the first defendant as a party in the suit, the court must pronounce that the suit against 'Estet Tan Kim Tiong' as being misconceived and untenable (see p 195I–196A).

[Bahasa Malaysia summary]

Plaintif adalah anak lelaki sah dan benefisiari si mati. Si mati mempunyai empat bidang tanah-tanah adat Melaka. Pihak-pihak bersetuju atas fakta-fakta tertentu, antara lain: (i) defendan kedua bukan anak perempuan sebenar di sisi undang-undang si mati; dan (ii) si mati telah meninggalkan suatu wasiat bertarikh 4 Oktober 1997 di mana beliau telah mewasiatkan tanah tersebut kepada defendan kedua. Isu di hadapan mahkamah adalah sama ada tanah tersebut, yang merupakan tanah adat Melaka, boleh diturunkan kepada defendan kedua — yang bukannya seorang Melayu, pemegang sijil atau anak sebenar si mati — melalui wasiat tersebut.

Diputuskan:

- (1) Di bawah Ordinan Wasiat 1959, setiap orang yang berfikirannya waras boleh bebas mendevis dan membekues atau memberikan melalui wasiat semua harta yang dimilikinya, atau untuk membuat apa yang beliau berhak kepada sama ada di bawah undang-undang atau ekuiti pada masa kematian beliau, walaupun beliau boleh berhak kepada harta tersebut selepas pelaksanaan wasiat tersebut. Memandangkan pihak-pihak di dalam kes ini telah bersetuju bahawa wasiat tersebut adalah dengan sahnya dan seperti yang sepatutnya telah dilaksanakan oleh si mati, adalah sewajarnya bahawa mereka menerima kompetensi si mati untuk membekues harta beliau kepada sesiapa yang beliau ingin. Memandangkan harta tersebut adalah dibahagikan menurut arahan-arahan wasiat tersebut, maka Ordinan Wasiat 1959 mengambil tempat utama (lihat ms 200 F–G).
- (2) Kesusahan defendan kedua yang bukannya merupakan anak perempuan sah kepada si mati atau seorang yang memegang sijil tidak menafikan hak beliau untuk mewarisi tanah tersebut. Memandangkan pihak-pihak telah bersetuju bahawa wasiat tersebut telah dilaksanakan seperti yang sepatutnya, tiada fraud yang ditimbulkan dan tiada halangan yang wujud di sisi undang-undang untuk menghalang si mati daripada membekues harta beliau kepada sesiapa pada kematian beliau, maka defendan kedua adalah berhak kepada tanah tersebut (lihat ms 200H–I).
- (3) Plaintif gagal membuktikan bahawa defendan pertama telah meninggal dunia atau suatu surat kuasa mentadbir telah dikeluarkan. Memandangkan bahawa defendan pertama adalah dirujuk sebagai 'Estet Tan Kim Tiong' di dalam writ dan tiada pindaan telah dipohon oleh plaintiff untuk membetulkan nama

- A** defendan pertama sebagai pihak di dalam guaman tersebut, mahkamah mesti mengumumkan bahawa guaman tersebut terhadap 'Estet Tan Kim Tiong' adalah tersalah anggap dan tidak dapat dipertahankan. (lihat ms 195I).]

B Notes

For cases on party generally, see 2(2) *Mallal's Digest* (4th Ed, 1996 Reissue) paras 3228–3408.

For cases on wills generally, see 11 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2050–2195.

C

Cases referred to

Abdul Wahab bin Abdul Rauf & Anor v Haji Wahab bin Haji Mohamed & Anor [1940] MLJ Rep 209 (refd)

Ho Sim Pat v Chang Ah Ngi & Anor [1988] 2 MLJ 629 (refd)

D *Kapoor Singh v Haji Ibrahim bin Haji Mohamed Noor* [1948] MLJ 29 (refd)

Letchumanan Chettiar v Palaniappa Chettiar [1978] 1 MLJ 120 (refd)

Pow Hing & Anor v Registrar of Titles, Malacca [1981] 1 MLJ 155 (refd)

Tan Hong Chit v Lim Kin Wan [1964] MLJ 113 (refd)

E *Wong Ah Yah & Anor v Lee Joo Eng & Anor* [1997] 1 CLJ Supp 282 (refd)

Legislation referred to

F National Land Code (Penang and Malacca Titles) Act 1963 ss 94, 104, 105, 108
Wills Ordinance 1959

WK Chew (HS Chew & Co) for the plaintiff.

Anthony Chua (Choo Ooi Koon & Co) for the defendants.

G

Cur Adv Vult

Suriyadi J: The plaintiff is the legitimate son and beneficiary of the late Tan Choon. The latter ('the deceased'), had four pieces of 'Malacca Customary Land' referred to as Lots 3127, 3128, 3129 and 3130 held under MCL 327, 328, 329 and 330 respectively in the Mukim of Sebatu, District of Jasin, Melaka ('the said land'). It was alleged that sometime in 1974, one Tan Kim Tiong agreed to lend to the deceased RM10,000, conditional on the former being allowed to reside on the said land, and with the further right of collecting all revenues from it. The loan would eventually be paid off by those collections. It was further alleged that the said Tan Kim Tiong was to vacate the said land at the end of the fifth year.

I Having perused the facts, it is my findings that the plaintiff failed to prove that the said Tan Kim Tiong has passed away or a letter of administration has been extracted. I am rather perplexed as to why the first

defendant is referred to as 'Estet Tan Kim Tiong' in the writ or dragged into the affray. On that ground too, as no amendment had been applied for by the plaintiff to correct the name of the first defendant as a party in the suit, I therefore must pronounce that the suit against 'Estet Tan Kim Tiong' as being misconceived and untenable. I therefore order that the suit against the latter be dismissed with costs.

To ensure that his position was secure, Tan Kim Tiong had persuaded the deceased to charge the land in his name. Aside from that arrangement, it was alleged that Tan Kim Tiong has fraudulently represented the loan amount in the charge as RM20,000 rather than RM10,000. In full compliance with the arrangements, the deceased had so charged the land on 23 September 1974 vide charge No 647/74 Jilid VIII, Folio 27, in Tan Kim Tiong's name. The latter accordingly entered and occupied the said land, and in the process harvested the fruits. In 1975 the deceased was alleged to have left Sungai Rambai, Melaka, for the town of Mengkuang in Pahang. The plaintiff in his statement of claim stated that on 22 December 1977 the deceased died, without leaving a will. It was further alleged that sometime in 1979 the second defendant had applied for the distribution of the said land, pursuant to Guaman Pembahagian No 41/1979, at the Land Office of Jasin. To ensure success, the second defendant was alleged to have falsely declared that she was the legitimate daughter of the deceased. In reality, the plaintiff remonstrated, she was the legitimate daughter of Tan Kim Tiong. It was based on those false representations that the Land Office of Jasin had issued that impugned distribution order.

Having gone through the rigmarole of written submissions, a radical development occurred when both parties sprang the dramatic news that they had narrowed down certain issues, and had agreed on some salient facts. I thereupon recorded the terms on 28 April 1999. The parties agreed that:

- (i) prayers (a) and (b) of para 22 of the statement of claim were to be withdrawn. Prayers (a) and (b) which overlapped revolved around the application by the plaintiff to have the Charge of 647/14 Jilid VIII Folio 23 declared null and void;
- (ii) the second defendant is not the lawful natural daughter of the deceased;
- (iii) the distribution order of 28 November 1979 to be set aside;
- (iv) the prayer (f) of the statement of claim be withdrawn. This prayer relates to matters of accounts and profits;
- (v) the will of 4 October 1974 does exist and was duly executed by the deceased;
- (vi) the question left for consideration is whether the said land, which is Malacca Customary Land, could be transmitted to the second defendant by way of the said will; and
- (vii) the second defendant's counterclaim as per prayers 22(a), (b) and (c) are still at large. The prayers respectively are:
 - (a) (a) is an application for a declaration that the deceased had left a valid and duly executed will;

- A (b) (b) relates to an application to have the second defendant declared the sole owner of the said land; and
(c) (c) is an application for general damages.

B The withdrawal of prayers (a) and (b) of the statement of claim by the plaintiff, meant that the loan charge identified as Perserahan No 647/14 Jilid VIII Folio 23 registered on 25 September 1974, remains valid (irrespective of the parties' agreement, the loan charge was clearly in contravention of s 108 of the Act, see *Pow Hing & Anor v Registrar of Titles, Malacca* [1981] 1 MLJ 155). By setting aside the distribution order of 28 November 1979, the foundation of the second defendant's right to register ownership over the said land had technically been removed. Regardless of that, due to the fact that registration had taken place, unless steps were taken to deregister that title, it remains good. By so consenting to the existence of a will dated 4 October 1974, duly executed by the deceased, prayer 22(a) of the second defendant's counterclaim therefore becomes unnecessary. Judgment for the second defendant pertaining to prayers 22(b) and (c) of the counterclaim are only obtainable if the outcome of agreed term No (vi) of the consent order were in the positive.

D The non-withdrawal of prayer (b) of para 22 of the counterclaim caused me some initial anxiety as it is connected to the prayer that the second defendant be declared the sole owner of the said land. Paragraph 15 of the amended defence clearly indicated that she had been registered as the owner pursuant to the distribution order of 28 November 1979, an order now set aside by consent. Regardless of the fact that the distribution order had been set aside, legally she still remains the registered owner. This is so, as under the National Land Code, unless set aside by a successful allegation of fraud or some other good reason, her title is indefeasible. I could only surmise that the second defendant had consented to the distribution order of 28 November 1979 be set aside, as she felt secure in the thought of her registered title. As regards the plaintiff's willingness to compromise his claim, I could only conjecture that with the distribution order out of the way, he believed that the second defendant's title could subsequently be defeated. Eventhough it is not within my jurisdiction to speculate the reasons why the parties compromised their respective stance, the circumstances of the case made it necessary for me to be vigilant so as to avoid being misled.

G Eventually, I was only left with the question of whether the said land, which was Malacca Customary Land, was transmissible to the second defendant (who is not a Malay, a certificated person or the natural child of the deceased), by way of the said will.

History

I The promulgation of the National Land Code (Penang and Malacca Titles) Act 1963 (Act 518) ('the Act'), saw the introduction of the framework for the change-over to the Torrens System in Penang and Malacca (*National Land Code and Commentary* by Judith Sihombing). Built into this Act, is Part VIII which provides for matters relating to *Malacca Customary Land*.

With the recognition of the institution of customary land, in the likely event of inconsistencies, this Part prevails over the National Land Code. Under s 102 of this Act a Malacca Customary Land Register is to be maintained, separate and distinct from all other registers relating to land in the State. No certificated land, will become indefeasible unless registered in that Malacca Customary Land Register (s 99(2); *Ho Sim Pat v Chang Ah Ngı & Anor* [1988] 2 MLJ 629; *Wong Ah Yah & Anor v Lee Joo Eng & Anor* [1997] 1 CLJ Supp 282).

What is certificated land? Under s 3 of the repealed Malacca Lands Customary Rights Ordinance (Cap 125), it was provided that no transfer of customary land shall be valid unless made to an individual qualified to become a customary land holder. One of the persons qualified to become a customary land holder was any person holding a certificate from the defunct Resident Councillor of Malacca. With the advent of the National Land Code (Penang And Malacca Titles) Act 1963 (Act 518), matters relating to customary land/certificated land were eventually taken over and subject to it. Under s 94, 'certificated land' means any customary land subject to Ch 3 of Part VIII. Under this chapter, the responsibility of declaring a person a certificated person is assumed by the State Authority (s 104 of the act). In a nutshell, under Act 518 'certificated land' means any land that has been so declared by the State authority, whilst a certificated person is one who qualified to become a customary land holder by virtue of a certificate, also issued by the State Authority.

Section 108 of the act comprehensively lays down restrictions over such Malacca Customary Land/certificated land, inter alia, barring any transfer, leasing, transmitting or charging any such land to any person other than a Malay. Such acts will not be valid and shall also not be capable of registration under the National Land Code. On that score, no action for breach of contract shall lie in respect of any dealing in or disposal of or any attempt to deal in or disposal of any certificated land. Furthermore, no rents supposed to be paid in pursuance to the above dealings shall be recoverable in any court (see *Tan Hong Chit v Lim Kin Wan* [1964] MLJ 113 for discussion purposes).

Interpreting the provisions of Part VIII, it is therefore quite safe to interpret that the Legislature intends to dissuade the Malays from parting with rights and interests relating to Malacca Customary Land. This stance is quite in line with the Malay Reservations Enactments of the respective Malay States which sought to secure to the Malays their interest in land (*Land Law in Malaysia* (2nd Ed) by Teo Keang Sood and Khaw Lake Tee; *Kapoor Singh v Haji Ibrahim bin Haji Mohamed Noor* [1948] MLJ 29).

In spite of those restrictions, certificated land is transmissible at the time of death of the owner but subject to certain strict preconditions. Section 105 which is relevant, reads:

Where any certificated person is registered as the proprietor of any customary land —

(a) ...

- A** (b) he shall have a permanent and hereditary right to the ownership of such land, and upon his decease such land shall be transmissible according to the law for the time being in force relating to succession;

The deceased in this case admittedly was a certificated person who possessed transmissible and hereditary rights over the impugned land. A prognosis of the law, in particular ss 104(1) and 105 read together, will lead to the conclusion that the transmission of title to the successor will not change or affect the character of the certificated land. The character will only change or cease, if it at any time, whether by transfer, succession or otherwise, becomes registered in the name of any Malay; and that also after the endorsement of 'Certificated Land' has been cancelled.

- B**
- C** As mentioned earlier, the second defendant's entitlement to inherit the land will depend on whether the deceased's personal succession law permits the conferment or bequest of that property on her. For a fact she is not a Malay, a certificated person or the legitimate daughter of the deceased. Unless she succeeds in bringing herself within the ambit of the phrase 'according to the law for the time being in force relating to succession' then her chances will be slim. In the course of the hearing, the case of *Abdul Wahab bin Abdul Rauf & Anor v Haji Wahab bin Haji Mohamed & Anor* [1940] MLJ Rep 209 was referred to for comparison and consideration. There it was held that Malacca Customary Land was not capable of devise by will but will descend on the death of the holder to the beneficiary according to Islamic law.
- D**
- E** This authority is unhelpful and distinguishable as the deceased was not dictated or subject to any superior religious laws at the time of death.

As the will of 4 October 1974 is relevant, and agreed upon by both parties as having been duly executed by the deceased, I therefore reproduce it in toto for reference purposes:

- F** This is the last will and testament of me, Tan Choon (I/C No 2463010) of 19 ms Sebatu, Malacca, planter.
- (1) I hereby revoke all former WILLS and CODICILES and testamentary dispositions heretofore made by me and declare this to be my last will and testament.
- G** (2) I appoint my youngest daughter, TAN SIEW TIN (I/C No 3714058) also of 19 ms Sebatu, Malacca, to be the sole Executrix and Trustee of this my will and testament.
- (3) I declare that I am the registered proprietor of the following pieces of land:

H	No	Lot No	Title No	Mukim	District	State	Area
	1	3127	MCL 327	Sebatu	Jasin	Malacca	1.7988 ac
	2	3128	MCL 328	— do —	— do —	— do —	0.291 ac
I	3	3129	MCL 329	— do —	— do —	— do —	1.9601 ac
	4	3130	MCL 330	— do —	— do —	— do —	0.520 ac

I give and devise and bequeath all the abovementioned four pieces of land unto my youngest daughter, TAN SIEW TIN for her own use and benefit absolutely.

- (4) I declare that I have certain deposits with the Malayan Banking Berhad, Jasin Branch, Jasin, Malacca and other banks. I give devise and bequeath these deposits unto my beloved wife, TIEW HOON (I/C No 4375904) for her own use and benefit absolutely.

IN WITNESS WHEREOF I have hereunto set my hand at Malacca this 4th day of October, One thousand nine hundred and seventy four (1974).

SIGNED by the abovenamed TAN CHOON)
as his Last Will and Testament in)
the joint presence of himself and)
us who at his request and in such)
joint presence have hereunto)
subscribed our names as witnessess)

sgd

Low Tung Weng
Advocate & Solicitor
Malacca

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(Yiow (undecipherable))

The relevant legislations pertaining to the law of succession applicable to the deceased are the Distribution Ordinance 1958 and the Wills Ordinance 1959. The former ordinance was promulgated to consolidate and amend the law relating to the distribution of intestate estates. The Wills Ordinance 1959 which does not apply to persons who profess the Muslim religion, provides for the distribution of properties in accordance with the instructions in wills (*Family Law in Malaysia and Singapore* (2nd Ed) by Ahmad Ibrahim). Under the Wills Ordinance 1959, every person of sound mind may freely devise, bequeath or dispose off by will all property which he owns, or to do which he is entitled either at law or in equity at the time of his death, notwithstanding that he may become entitled to that property subsequent to the execution of the will. As parties had agreed that the will was validly and duly executed by the deceased, it stands to reason that they accepted the competency of the deceased to bequeath his property to anyone he desired. As the said property was distributed according to the instructions of the impugned will, the Wills Ordinance 1959 therefore takes centre stage.

So, does her predicament of not being the legitimate daughter of the deceased or certificated person deny her the right to inherit the said land? It is my considered opinion that as parties had agreed that the will was duly executed, what with no fraud being suggested, and no legal obstacle present to prevent the deceased bequeathing his property to anybody at his death-bed, the second defendant therefore is entitled to the said land. The court is only concerned with the question of the genuineness of the will, its due execution and attestation, and testamentary capacity of the testator. It is not the business of the court to question why a bequest was made by a

- A** testator to any particular person (*Letchumanan Chettiar v Palaniappa Chettiar* [1978] 1 MLJ 120). All that was required of her thereafter, was to do the needful under the National Land Code to protect her bequest. That she did on 28 November 1979 when her interest was registered. Eventhough my conclusion may perhaps go against the spirit of the Legislature in its attempt to dissuade the Malays from losing their rights and interest relating to Malacca Customary Land, my hands are tied. The court is here only to put into effect the law, and not go beyond it. As the provisions brook no other strained interpretations, it is thus up to the Legislature to cap the chink.
- B**

- On the above analysis and conclusion I therefore dismiss prayers (e), (g) and (h) of para 15 of the writ with costs. No order is made as to prayers (a), (b), (c), (d) and (f) of the same paragraph by virtue of their withdrawals by the plaintiff. I make no order as to prayer (a) of para 22 of the counterclaim as parties had agreed that the will was duly executed by the deceased. Prayers (c), (d) and (e) are rejected as no evidence was adduced at any stage by the second defendant to make out a case. I give judgment as prayed for prayers (b) and (f) (costs) of para 22 of the counterclaim.
- D**

Order accordingly.

Reported by Jafisah Jaafar

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